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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 349.

MAYFLOWER FARMS, INC.,

Appellant,

against

PETER G. TEN EYCK, Commissioner of the Department of Agriculture and Markets of the State of New York, and KENNETH F. FEE, Director of the Division of Milk Control in the Department of Agriculture and Markets of the State of New York,

Appellees.

BRIEF FOR APPELLEES.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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BRIEF FOR APPELLEES.

Facts.

Appellant's statement of the case is correct, except that three paragraphs on page 5 lack clear support from the record. None of them is important, all may be true, and each has sufficient support in the record to show that the misstatement, if any, is unintentional. In the interest of strict adherence to the record the following corrections are made: (a) As to paragraphs 3 and 6, it does not clearly appear that "Puritan" is a trade name for the milk sold by Supreme Milk and Cream Company, or that the five other dealers are sell-

ing the same milk. (b) As to paragraph 8, it does not clearly appear that the milk sold at the lower price is the same kind of milk, or sold by competitors, and testimony at page 38 of the record suggests that the lower priced milk referred to is that sold at 8 cents by the Public Health Stations.

Summary of Argument.

1. There was good reason for limiting the privilege of selling at the "unadvertised" price to dealers who were in business on April 10, 1933, when the original milk control law was enacted. The classification is not unconstitutional.

2. Even if the time limitation is unconstitutional, appellant is not entitled to any relief in this proceeding. The Court will not exercise "judicial surgery" for the purpose of extending to the appellant and other new dealers the benefit of the "unadvertised differential" provision.

POINT I.

There was good reason for limiting the privilege of selling at the "unadvertised" price to dealers who were in business on April 10, 1933, when the original milk control law was enacted. The classification is not unconstitutional.

Appellant was incorporated in May, 1933, soon after enactment of the original milk control law. It commenced business in September, 1933. (R. 11.) The original milk control law contained what was essentially the provision quoted below. That was chapter 158 of 1933, section 317, subdivision *e*. The material shown in

brackets was eliminated when the statute was revised in 1934, and the material shown in italics was added. As enacted by chapter 126 of 1934, section 258-q, the provision is as follows, ignoring the matter in brackets:

> "It shall not be unlawful for any milk dealer who [at the time this act shall take effect is] *since April tenth, nineteen hundred thirty-three has been* engaged *continuously* in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, *and such lower price shall also apply on sales from stores to consumers;* provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed [by the board] for such sales to stores in such a city."

The reason for the latter insertion, making the lower price applicable to sales from stores to consumers, is of no present importance. See 1933 *Op. Atty. Gen.* 408.

The reason for the other change is that the earlier law became effective on April 10, 1933, and the 1934 law continued reference to that same date. So far as the present question is concerned the 1934 and 1935 laws provide just what the original law provided. Can that discrimination in the original law, between dealers in business before it was enacted and those entering business thereafter, be justified?

The case of *Borden's Farm Products Company v. Baldwin* (No. 597 for the present term; argued Jan-

uary 6, 1936) involves a different and broader constitutional question. That suit was brought by one of the advertised dealers, which claims that there is no justification for compelling it to sell milk to stores for a cent more than the selling price of its "unadvertised" competitors. The present appellant does not make that claim, because it would gain nothing if it succeeded. If the entire "unadvertised differential" provision is bad, as Borden's contends, then the present appellant clearly is not entitled to any benefit from it. The present appellant's constitutional proposition necessarily assumes the general constitutionality of the "unadvertised differential", and says that it (the appellant) is entitled to sell at the lower price, and that its incorporation since April 10, 1933, is no valid reason for excluding it from enjoyment of the lower selling price allowed to older "unadvertised" dealers.

For the purpose of testing the narrow question of constitutionality involved in the present case it is necessary to examine the facts underlying the statute. Those are covered so fully in the several opinions which have been written in the Borden's litigation that for present purposes they will merely be summarized.

It seems that before the 1933 milk control law passed the "independent" or "unadvertised" dealers became worried about how they would keep their trade under a system of fixed resale prices. The fact that sales of "bulk" milk were to cease on June 1, 1933, was a serious aggravation of the trouble. There was reason to fear that on an equal price basis most of the business of selling milk through stores would pass into the hands of large and well-known dealers. To

meet that practical situation, and save existing businesses of "unadvertised" dealers from confiscation, the "differential" provision was introduced into the statute. But it was limited in its scope by the reason for it. The Legislature did not wish to increase and intensify the lower-price competition against the "advertised" dealers by permitting new dealers to join it, and if persons and corporations wanted to make investments in the milk business after April 10, 1933, they were required to attach themselves to the higher-price group.

New legislation frequently makes important distinctions with relation to its effective date, and such classification, far from being arbitrary and unfair, often is necessary to protect from an unfair burden those who began business before the statute was contemplated. In *Sperry & Hutchinson Co. v. Rhodes,* 220 U. S. 502, 505, Mr. Justice Holmes said:

> "The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time."

In *Buck v. Bell,* 274 U. S. 200, 208, he said:

> "The law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow."

Watson v. Maryland, 218 U. S. 173, involved a statute for examining and registering physicians. Watson was convicted of practising without having been registered, and he said that the law was unconstitutional because it exempted from examination certain physi-

cians who were practising before the law was enacted. The Court said (pages 177, 178):

> "In such statutes there are often found exceptions in favor of those who have practiced their calling for a period of years. In *Dent v. West Virginia*, 129 U. S. 114, an exception was made in favor of practitioners of medicine who had continuously practiced their profession for ten years prior to a date shortly before the enactment of the law. Such exception proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination before a board of medical experts. In the statute under consideration, the excepted class were those who had practiced before the 1st day of January, 1898, being more than four years before the passage of the law, and who could show, presumably with a view to establishing that they were actively practicing at that time, that they had treated at least twelve persons, within one year of that date. * * * We see nothing arbitrary or oppressive in the classification of physicians subject to the provisions of this statute."

The case of *People v. Griswold*, 213 N. Y. 92, is to similar effect. The statute regulated the practice of dentistry, with an exception for those who were practising at a certain period before the statute was enacted. Said the Court (page 97):

> "The appellant has no grievance from the provision that those duly licensed and registered as dentists in this state prior to the first day of August, 1895, are deemed licensed to practice. It is the rule for such acts to preserve the status of those lawfully engaged in the pursuit regulated."

See, to similar effect as to exemption from examination of barbers who were active at the time the law

was enacted or a certain number of years before, *Cooper v. Rollins,* 152 Ga. 588, 110 S. E. 726; *People v. Logan,* 284 Ill. 83, 119 N. E. 913; *Criswell v. State,* 126 Md. 103, 94 Atl. 549; *Commonwealth v. Ward,* 136 Ky. 146, 123 S. W. 673. Cases of statutes regulating dentists, and upholding a similar exception, are *State v. Creditor,* 44 Kan. 565, 24 Pac. 346, and *Ex parte Whitley,* 144 Cal. 167, 77 Pac. 879.

In the case of *Sammarco v. Boysa,* 193 Wis. 642, 215 N. W. 446, the Wisconsin Supreme Court upheld a Milwaukee ordinance against keeping automobiles in wooden garages, with an exception for pre-existing garages housing not more than two cars. The Court listed several classes of laws which ordinarily are limited to "prospective" operation, such as zoning laws, and said:

> "To assert that the ordinance here under consideration denies the equal protection of the law would not only defeat the purpose of zoning laws in general, but it would amount to a declaration that society is powerless to prevent the growth and development of an evil without completely stamping out the evil. * * * Consideration for existing property rights furnishes a legitimate basis for classification with reference to legislation such as this. Indeed, laws of this character are more frequently attacked because they invade existing property rights."

Zoning ordinances making exceptions for existing nonconforming buildings have frequently been upheld. See *Manheim v. Harrison,* 164 La. 564, 114 So. 159; *Aurora v. Burns,* 319 Ill. 84, 149 N. E. 784; *Spector v. Building Inspector,* 250 Mass. 63, 145 N. E. 265. The case of *Standard Oil Co. v. Charlottesville,* 42 Fed. (2nd) 88, cited at pages 43-44 of appellant's brief, ap-

pears to be to the contrary, but is quite distinguishable upon its peculiar facts and the view the Court took of them.

In the case of *City of Norton v. Hutson,* 142 Kan. 305, 46 Pac. (2nd) 630, it was held that the erection of a new cream buying station in a certain block could be prohibited under a zoning ordinance, although it permitted the continued operation of an existing station. The principle of abolishing nuisances gradually, or merely preventing their increase, is somewhat akin to the favor which existing facilities receive under public utility regulation. For an example of that, see *Stanley v. Utilities Commn.,* 295 U. S. 76.

City of New York v. Kelsey, 158 App. Div. 183, affirmed 213 N. Y. 638 mem., upheld a statute which forbade establishing any new cemetery within half a mile of the water supply, but provided that burials could continue in existing cemeteries. The Appellate Division said:

> "It [the Legislature] could have said, as it did say, that there were in its judgment sufficient of these existing burial grounds, and that there should be no further extensions or additions to them."

See, to similar effect, *Baylis v. Van Nostrand,* 176 App. Div. 396, and *Moritz v. United Brethrens Church,* 269 N. Y. 125. The cases of *Commonwealth v. Charity Hospital,* 198 Pa. 270, 47 Atl. 980, and *Commonwealth ex. rel. Elkin v. Charity Hospital,* 199 Pa. 119, 48 Atl. 906, upheld a Pennsylvania statute forbidding the establishment of any additional hospital, pesthouse or burial ground in the built-up portions of cities, but saving those already established.

The cases already cited under this point will serve to illustrate that there is no inflexible constitutional prohibition against treating as a separate class those persons in a business at the time it is first subjected to regulation. The question is whether the lines of classification are clearly unreasonable under the facts of the business regulated. It is respectfully submitted that there was good reason for limiting the privilege of selling at the "unadvertised" price to dealers who were in business on April 10, 1933, when the original milk control law was enacted. That classification is not unconstitutional.

POINT II.

Even if the time limitation is unconstitutional, appellant is not entitled to any relief in this proceeding. The court will not exercise "judicial surgery" for the purpose of extending to the appellant and other new dealers the benefit of the "unadvertised differential" provision.

The statutory provision, so far as now relevant, is a single sentence of the Milk Control Law (Ch. 126 of N. Y. Laws of 1934, Section 258-q) as follows:

> "It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event

shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

Appellant has not been engaged continuously in business since April 10, 1933; it was not incorporated until May, 1933, and commenced business in September. (R. 11.) It insists, nevertheless, that it is entitled to sell at the lower price. There is no provision authorizing such a price for any dealer except the statutory language quoted above. Obviously it is inapplicable to the appellant, unless by a very peculiar operation of judicial surgery.

The majority opinion of the Court of Appeals passed over that question, addressed itself to the constitutional question, and upon that question decided against the appellant. That was sufficient ground to decide against the appellant, but the dissenting opinion of Judge Finch found it necessary, as will any opinion that is written for the relief of the appellant, to decide the question of separability. That question is essential to the appellant's case, and unless it can be decided in the appellant's favor there is no need to decide the constitutional question.

The dissenting opinion dealt with the question of separability as follows:

> "Although the time limitation clause is unconstitutional as denying to the appellant the equal protection of the laws, this does not require that the entire provision be declared a nullity. The section contained a separability clause and it is only necessary to delete the offending clause, viz: 'since April 10, 1933.' With the arbitrary time limitation excised from the unadvertised differential

> provision, the appellant will assume its rightful place in the class of milk dealers selling unadvertised milk and be able to meet the competition if it can, not only of the well advertised dealers, but also of the unadvertised dealers who already have an established business and are selling the same product in the same territory as the appellant. Thus will the arbitrary, unreasonable and invalid time limitation be destroyed and at the same time the original purpose of the law, to protect the milk producer, to preserve competition and to stabilize milk prices, be promoted and safeguarded." (R. 60.)

It is respectfully submitted that the dissenting opinion erred upon the question of separability, and that "judicial surgery" should not be exercised for the purpose of extending to the appellant and other new dealers the benefit of a somewhat remarkable statutory provision, not extended to them by the Legislature.

The Legislature was moved by the anticipated hardship of an even price, upon dealers whose existing businesses depended upon continuing sales at a lower price, to make them a concession which this Court has said is "novel, if not unique." *(Borden's Farm Products Co. v. Baldwin,* 293 U. S. 194, 203.) The Legislature made the concession only to the extent that it was needed. It intended merely to save *existing* business done on the lower price level; it had no intention of encouraging new dealers to come in on that basis. There is no reason to suppose that the Legislature would have made the privilege to sell at the lower price apply alike to new and old dealers in unadvertised milk if it had been told that it could not limit the privilege to old dealers.

For the purpose of testing that question the language used in the statute is significant. The dissenting opinion and the appellant's brief assume that the statute and order impose a command substantially as follows:

> "No milk dealer shall sell bottled Grade B milk to a New York City store for less than 10¾ cents per quart;"
>
> "Except that all dealers in unadvertised milk may sell for 9¾ cents per quart;"
>
> "But the exception shall not apply to dealers in unadvertised milk who have commenced such business since April 10, 1933."

If the command of the Legislature really were divisible into those three separate steps, either by its reason or its grammatical relationships, a stronger argument could be made for cutting off the final proviso. Such is not the fact, as can be seen by examining either the statutory provision or the reasons that shaped it. The fact is that the exception is single and inseparable, of an inclusiveness exactly proportioned to the need for it, and that the appellant can be saved only by judicial extension of a statutory provision not favored by this Court, along lines which the Legislature did not approve and probably would not have approved and of such nature as to aggravate the charges being made against the statutory provision as a whole in the *Borden* suit.

Appellant's brief cites no case where judicial reshaping of a statute has been carried so far. We have examined the cases cited, particularly those under appellant's Point II. The four Wisconsin cases cited on page 50 all held statutes to be constitutional, and are

relevant only for dictum. The other cases held statutes unconstitutional because of unreasonable classifications, and in some of them the offending classification was of time, between persons in business or facilities in use on a certain date and new persons or facilities. In no one of them, however, did the Court proceed from a decision that the distinction was unreasonable and invalid, to a conclusion that the statute was in all other respects valid and that new and old should be treated alike under the statute for purposes of licensing or other statutory treatment. The contrary conclusion, that the statute was completely invalid, was reached in all the cases, usually without discussion. *Nichols v. Walter,* 37 Minn. 264, and *Hauser v. N. B. & Merc. Ins. Co.,* 206 N. Y. 455, 465, are cases where the question of separability was discussed, and in both cases the decision was that the statute was completely void.

The statute now under consideration contains a separability clause, but we do not understand that such a clause is conclusive upon all questions of separability. Such a clause is "but an aid to interpretation and not an inexorable command." *Dorchy v. Kansas,* 264 U. S. 286, 290; *Williams v. Standard Oil Co.,* 278 U. S. 235, 242; *Utah Power & L. Co. v. Pfost,* 286 U. S. 165, 184; *Champlin Rfg. Co. v. Commn.,* 286 U. S. 210, 235.

The general rule as to separability has been stated and applied many times. See, for examples, *Sprague v. Thompson,* 118 U. S. 90, 94-95; *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 565; *Lynch v. United States,* 292 U. S. 571, 586. The rule applied by the

highest court of New York State is the same. *People ex rel. Alpha P. C. Co. v. Knapp,* 230 N. Y. 48, 60; *City Bank F. T. Co. v. N. Y. C. R. R. Co.,* 253 N. Y. 49, 55-57; *People v. Mancuso,* 255 N. Y. 463, 472-474.

The decision now involved was based by the State court upon a Federal ground. We believe that it could equally well have been based upon the non-Federal ground that the time provision is inseparable, and cannot be reversed effectively without deciding that the provision is separable. In opposition to jurisdiction, we urged that the Federal question was not necessary to the determination of the case (see *Arkansas Southern R. R. v. German Bank,* 207 U. S. 270, 275; *Fox Film Corp. v. A. B. Muller,* Dec. 9, 1935), but we now believe that this Court takes jurisdiction of the intermingled questions *(Enterprise Irrig. Dist. v. Canal Co.,* 243 U. S. 157), and will exercise its discretion as to whether to decide either or both of them. Conceivably it may decide the question of constitutionality and remit the question of separability to the state courts *(Dorchy v. Kansas,* 264 U. S. 286), or it may decide both questions *(Abie State Bank v. Bryan,* 282 U. S. 765, 773), or it may decide only that the provision is inseparable and hence that the appellant cannot be affected by any decision as to its constitutionality.

We respectfully submit that the course last mentioned is the correct one. Even if the time limitation is unconstitutional, appellant is not entitled to any relief in this proceeding. The court will not exercise "judicial surgery" for the purpose of extending to the appellant and other new dealers the benefit of the "unadvertised differential" provision.

FINALLY.

It is respectfully submitted that the judgment below should be affirmed.

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